

Summaries of Nebraska Supreme Court and Court of Appeals Decisions on Workers' Compensation Cases

Fiscal Year 2001: July 1, 2000 to June 30, 2001

Supreme Court Cases:

1. Blizzard v. Chrisman's Cash Register Co., 261 Neb. 445, 623 N.W.2d 655 (2001).

ATTORNEY FEES

INTEREST

The Supreme Court affirmed the decision of the Court of Appeals and review panel, finding that plaintiff's attorney was not entitled to a one-third share of the penalties voluntarily paid by the defendant carrier, that the attorney was not entitled to attorney fees, and that the widow was not entitled to interest on the amount paid as a penalty.

The decedent was killed in a work accident. His widow and child received benefits, and in 1986 the widow remarried. The carrier paid the widow the appropriate remarriage benefits. Upon the widow's remarriage however, the carrier should have increased the benefits paid to the child and attorney. Due to an unintentional error by the carrier, benefits were not increased and the mistake continued for 568 weeks, without complaint by the child or attorney. In 1997, the carrier discovered the underpayment and paid the child \$54,528.00 and the attorney \$34,080.00, which represented the underpayment of benefits. The carrier also paid the child \$44,304.00 as a fifty-percent waiting-time penalty. No proceedings were held before the Workers' Compensation Court to recover these amounts and no legal services were provided by the attorney. On June 4, 1998, the attorney filed a petition alleging that he was entitled to a fifty-percent penalty on the \$34,080.00 voluntarily paid to him and further alleging that there was unpaid interest and penalties due to the widow and child.

The Court of Appeals held that the attorney was not entitled to a statutory award of attorney fees because an attorney may not create work for himself by filing a petition for attorney fees in the compensation court and then argue that the work done to prepare for trial of the case constitutes the sole basis for an award of a fee. The work added nothing to the benefits the child had already received. The attorney provided no legal services in recovering the penalty because it was voluntarily paid. The Court of Appeals agreed with the review panel that the additional attorney fees would, "constitute nothing more than a windfall to [attorney]". *Blizzard v. Chrisman's Cash Register Co.*, No. A-99-1118, 2000 WL 1207130 at *3 (Neb.App. Aug. 22, 2000).

The Supreme Court agreed with the Court of Appeals that §48-125(1) does not allow for an award of attorney fees where no court proceedings were held and that voluntary payments by the carrier is not an award of compensation under §48-125(1). The Supreme Court also agreed that §48-125(2) does not allow the award of interest in this case because the language in §48-125 clearly reads that an award of attorney fees is a prerequisite before interest on the compensation amount due may be awarded under §48-125(2).

2. Fay v. Dowding, Dowding, 261 Neb. 216, 623 N.W.2d 287 (2001).

NUNC PRO TUNC ORDER

The Supreme Court vacated the nunc pro tunc order of reversal on review entered by a three-judge review panel of the compensation court. The nunc pro tunc order withdrew an order of affirmance which had been entered six days earlier by the same panel affirming an award of benefits to plaintiff. The nunc pro tunc order was entered after the panel became aware of *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999), a newly published decision which addressed repetitive trauma injuries. In *Jordan v. Morrill County*, supra it was held that to prove a cumulative trauma accident, there must be an interruption of employment. Based on this, the review panel determined that it had decided the pending case incorrectly because plaintiff had not actually missed time from work. Therefore, she did not fulfill a necessary requirement to prove that she suffered repetitive trauma injuries due to her clerical work with defendant.

In vacating the nunc pro tunc order, the Supreme Court cited its previous holding that the use of a nunc pro tunc order is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded. *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 113, 459 N.W.2d 519, 522 (1990). The Court also cited *Continental Oil Co. v. Harris*, stating that a nunc pro tunc order cannot "be employed where the fault in the original judgment is that it is wrong as a matter of law, nor can it be employed to allow the court to review and reverse its action with respect to what it formerly did or refused to do." 214 Neb. at 424, 333 N.W.2d at 923 (1983). The Court specifically held that the review panel's goal was not to correct the issuance of an order which did not accurately reflect the decision of the review panel. Instead, the review panel's goal was to substitute a reversal for an affirmance. In doing so the review panel exceeded its authority under §48-180 in issuing the second order.

The Court then considered the merits of the original order of affirmance. Their evaluation centered on two elements: 1) whether plaintiff had proven that the accident happened suddenly and violently and 2) whether the single judge erred as a matter of law in admitting into evidence a loss of earning power evaluation rebutting the court-appointed vocational rehabilitation counselor's loss of earning power evaluation.

The single judge made findings of fact that plaintiff interrupted her employment and sought medical treatment for her injuries, though no temporary total disability was awarded. The Supreme Court found that this satisfied the suddenly and violently element addressed in *Jordan v. Morrill County*. The trial judge's findings of fact had the effect of a jury verdict and would not be disturbed unless clearly wrong. Therefore, the review panel's original order of affirmance awarding benefits was affirmed.

3. Gebhard v. Dixie Carbonic, 261 Neb. 715, 625 N.W.2d 207 (2001).

SUBJECT MATTER JURISDICTION

EMPLOYEE STATUS

PREHIRING PHYSICAL EXAM

The Supreme Court affirmed the compensation court's dismissal of the plaintiff's claim for injuries allegedly sustained during a pre-employment physical examination as there was no entitlement to workers' compensation benefits absent an employer-employee relationship.

Plaintiff was required to submit to a physical examination as a condition precedent to employment with defendant. During the exam, she lifted a box, injuring her lower back. Plaintiff was not hired for the job, and she subsequently filed a petition seeking benefits. The trial judge dismissed the claim, noting that plaintiff had not passed the physical exam and was not on the payroll at the time of her participation in the exam and was therefore not employed. On appeal, the Supreme Court determined that the record supported the findings of the compensation court in all respects. A basic principle of the Nebraska Workers' Compensation Act is that only employees are entitled to workers' compensation benefits and the plaintiff must prove that he or she has employee status to invoke the jurisdiction of the court. Whether an employer-employee relationship exists is a question of fact. The cases cited by plaintiff to support her position that an injury occurring during a prehiring physical examination should be compensable were all distinguishable on the facts, as more of a contractual relationship had been shown in the case law as opposed to a mere conditional offer of employment as in the instant case. Neb. Rev. Stat. §48-115 requires that a person be under a contract of hire in order to be considered an employee. The Court declined to adopt a rule making injuries occurring during a prehiring physical examination compensable.

4. Guico v. Excel Corp., 260 Neb. 712, 619 N.W.2d 470 (2000)

WILLFUL NEGLIGENCE

TEMPORARY TOTAL DISABILITY

REASONABLE CONTROVERSY

The Supreme Court affirmed the compensation court's finding that plaintiff was not willfully negligent and was entitled to temporary total disability benefits. However, the Supreme Court held that there was a reasonable controversy and vacated the award of waiting-time penalties and attorneys fees.

On the date of injury, plaintiff switched to the job of rib-splitter without authorization. This job required the use of metal mesh gloves, but plaintiff did not put on the required safety equipment and his knife slipped, lacerating his thumb and index finger. The plaintiff was terminated the next day for violating the employer's safety rules. The trial court found that plaintiff's failure to follow a specific safety rule promulgated by defendant did not constitute willful negligence and that plaintiff was entitled to temporary total disability benefits even though plaintiff was terminated for cause. Finding no reasonable controversy, the trial court awarded waiting-time penalties and attorneys fees. The review panel affirmed the judgment of the trial court.

On appeal, defendants argued that plaintiff had neither sought nor received the approval of his supervisor to switch jobs in accordance with defendant's safety rule. The Supreme Court found that this rule was not always followed given the conflicting testimony of plaintiff and plaintiff's supervisor. Therefore the trial court was not clearly wrong in finding that defendant's safety rule was not "kept alive by bona fide enforcement," one of the factors courts have considered in determining whether a violation of a safety rule should disqualify a worker from benefits. Furthermore, the Supreme Court stated that in order to avoid liability under §48-107, an employer must prove a deliberate act knowingly done or at least such conduct as evidences a reckless indifference to the employee's own safety. See *Collins v. General Casualty*, 258 Neb. 852, 606 N.W.2d 93 (2000). Mere negligence is not sufficient. The Court concluded that the trial court was not clearly wrong in determining that plaintiff's failure to comply with the safety rule was a momentary lapse of judgment as opposed to reckless indifference to safety. Because the Court had not previously addressed the issue of the circumstances under which a violation of an employer's safety rule constitutes willful negligence, a reasonable controversy existed. Therefore, the trial court's award of waiting-time penalties and attorney fees was in error.

Defendant also contended on appeal that plaintiff was not entitled to temporary total disability benefits following his termination for cause on the day after his injury because the termination - not the injury - was the proximate cause of plaintiff's unemployment. The Court disagreed, stating that an injured employee's termination does not destroy his right to compensation for the injury. *Aldrich v. ASARCO, Inc.*, 221 Neb. 126, 375 N.W.2d 150 (1985). Therefore, plaintiff's termination did not disqualify him from receiving temporary benefits.

5. Hagelstein v. Swift-Eckrich, 261 Neb. 305, 622 N.W.2d 663 (2001).

MODIFICATION

ATTORNEY FEE

The Supreme Court affirmed the compensation court's award of benefits, but found that the review panel had erred in not awarding attorney's fees, and in making the modification of benefits retroactive beyond the date of application for modification.

The defendant had unilaterally discontinued payment of temporary total disability benefits which had been ordered to be paid indefinitely in a previous award. Plaintiff filed a petition but the compensation court found sufficient evidence to support the modification and reduction of benefits. The Supreme Court agreed with the modification, but found both lower courts erred in determining the date temporary total disability ended. The trial court said that plaintiff reached maximum medical improvement and ceased being temporarily totally disabled on April 24, 1995. The review panel affirmed the modification, but found that temporary total disability benefits should have continued until March 6, 1996, the date on which plaintiff's petition contesting reduction of benefits was filed. See *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998) (holding that modification of workers' compensation award cannot be applied retroactively beyond date of application).

The Supreme Court treated defendant as the applicant for modification. Therefore, the obligation to pay plaintiff the temporary total disability benefits originally awarded extended until the date defendant's answer was filed, or March 26, 1996. The Court reiterated that the employer's unilateral cessation of benefits was not to be the basis for modification of a benefits award, and that employers are prohibited from doing so. The Court also granted attorney fees to plaintiff because he obtained an increase in the award, even though it only amounted to a few extra weeks of temporary total disability.

6. Hollandsworth v. Nebraska Partners, 260 Neb. 756, 619 N.W.2d 579 (2000).

LUMP SUM SETTLEMENTS

WAITING TIME PENALTIES

The Supreme Court affirmed the compensation court's finding that payment pursuant to a lump-sum settlement approved by the Workers' Compensation Court is subject to the waiting-period penalty provided in §48-125.

Plaintiff was injured in 1997 while employed by defendant. The parties reached a settlement which was approved by the compensation court on April 9, 1999. On April 19, 1999, the insurance carrier for defendant issued a settlement check, but plaintiff did not receive it. On May 11, 1999, plaintiff filed a motion for penalties in the compensation court. The settlement check had been received by defendant's counsel, but kept in the claim file until receipt of the May 11 motion for penalties. On May 13, 1999, the settlement check was hand delivered to plaintiff's attorney.

The trial court awarded a 50 percent penalty pursuant to §48-125 because the check was delivered after 30 days had passed from approval of the lump-sum settlement. The review panel affirmed and awarded attorney fees.

Defendant argued that §48-125 applies only to delinquent periodic payments. The Supreme Court found that §48-125 is not limited to periodic payments and applies to final adjudicated awards. The Court based its opinion on several sections of the Nebraska Workers' Compensation Court statutes. Section 48-125 states that a 50 percent penalty shall be added "for all delinquent payments". Under §48-138, periodic payments may be commuted to one or more lump-sum payments, thus bringing a lump-sum payment under the scope of §48-125. In addition, §48-139 provides that a court approved lump-sum settlement is final and conclusive and the Court has previously held that penalties under §48-125 apply to final adjudicated awards. See *Gaston v. Appleton Elec. Co.*, 253 Neb. 897, 573 N.W. 2d 131 (1998).

In the alternative, defendants argued that if §48-125 does apply, the penalty should be calculated only on the amount of those periodic payments which accrued after the date the settlement was approved by the compensation court. The Court disagreed, stating that nothing in §48-125 allows a penalty to be assessed on only a portion of a delinquent payment. The Court also stated that assessing a penalty based on only a portion of the payment due ignores the importance of timely payment and the fact that the parties agreed to commute the periodic payments into one single payment.

Finally, because the employer filed an application for review and failed to obtain a reduction in the amount of the award, the review panel did not err in awarding attorney fees.

7. Jameson v. Liquid Controls Corp., 260 Neb. 489, 618 N.W.2d 637 (2000).

SUBROGATION

The Supreme Court reversed and remanded for further proceedings a district court's decision that the workers' compensation insurance carrier (Aetna) had no subrogation rights to the employee's settlement from an alleged third-party tort-feasor.

The employee was severely burned when gasoline vapor from a fuel delivery truck owned by the employer ignited. In addition to his workers' compensation claim, the employee brought tort actions against the fuel pump manufacturer and the fuel meter manufacturer. Aetna paid the employee approximately \$450,000.00 in workers' compensation benefits. The fuel pump manufacturer settled out of court for \$1,425 million, and a jury returned a verdict against the fuel meter manufacturer in the amount of \$5 million. The district court denied Aetna's claim for subrogation in the third-party settlement or judgment because it was "inequitable to allow Aetna to recover funds arising from pain and suffering or loss of consortium to satisfy its claims."

The Supreme Court disagreed stating that the plain language of Neb. Rev. Stat. §48-118 as amended in 1994 does not distinguish between settlement proceeds paid for pain and suffering, medical benefits, or any other category of damages or injury in awarding an insurance company a subrogation interest in the settlement proceeds. This approach is consistent with the approach taken by a number of other jurisdictions. The Court therefore reversed the decision of the district court denying the carrier any subrogation interest in the third-party settlement and remanded for a determination of a fair and equitable distribution of the proceeds of the jury verdict and the third-party settlement in accordance with §48-118.

8. Logsdon v. ISCO Co., 260 Neb. 624, 618 N.W.2d 667 (2000).

UNEXPLAINED FALL

POSITIONAL RISK DOCTRINE

The trial judge found plaintiff's injury to be compensable and awarded benefits. The review panel reversed and dismissed the petition, determining that unexplained falls are not compensable in Nebraska. The Supreme Court reversed the review panel and remanded the case with directions to affirm the award entered by the trial judge.

For health reasons, defendant encouraged its employees to walk. On the date of injury, plaintiff fell while walking around the periphery of the building during a break from work. Plaintiff testified that he did not remember falling and the record contained no other evidence indicating how or why plaintiff fell.

The Court explained that all risks causing injury to an employee can be placed with three categories: (1) employment related, (2) personal, and (3) neutral. Harm that arises from risks associated with employment is universally compensable and harm associated with personal or idiopathic causes is universally noncompensable. See *Larson's Workers' Compensation Law* §4.00 (2000). The Court found that because the cause of an unexplained fall is unknown, the fall must be attributed to a neutral risk. The Court has held that in Nebraska the harm that arises from neutral risks is generally compensable. See *Monahan v. United States Check Book Co.*, 4 Neb.App. 227, 540 N.W.2d 380 (1995).

Defendant argued that an unexplained fall, in the course of employment, does not "arise out of" the employment within the meaning of §48-101. Courts have taken three approaches in addressing the "arising out of" element in unexplained fall cases. One approach requires the employee to rule out idiopathic causes. See *Phil A. Livesley Co. v. Russ*, 296 Or. 25, 672 P.2d 337 (1983). The second approach places the burden on the employee to show a causal connection between the injury and the employment. See *Brickson v. ILHR Department*, 40 Wis. 2d 694, 162 N.W.2d 600 (1968). The third approach employs the positional risk doctrine. Under this doctrine, an employee's injuries are compensable as long as employment duties put the employee in a position that the employee might not otherwise be in which exposes the employee to a risk, even though the risk is not greater than that of the general public. See *Circle K Store No. 1131 v. Indus. Com'n*, 165 Ariz. 91, 796 P.2d 893 (1990).

The Court explained that "but-for" reasoning is the foundation of the positional risk doctrine. The positional risk doctrine is based on the principle that employees who are on the job and performing duties for their employers should be compensated for injuries occurring in the course thereof. In the instant case, plaintiff would not have been at the place of injury "but-for" the duties of employment. Consequently, a presumption arises that his injuries arose out of his employment, and this presumption was not rebutted by evidence of any idiopathic cause or other risk personal to the claimant. Therefore, the Court found plaintiff's injuries to be compensable under the Nebraska Workers' Compensation Act.

9. Torres v. Aulick Leasing Inc., 261 Neb. 1016, 628 N.W.2d 212 (2001).

GOING AND COMING RULE

SPECIAL ERRAND EXCEPTION

COMMERCIAL TRAVELER

This was the second appearance of this case before the Supreme Court. The Court previously remanded the case with directions for the compensation court to enter an order complying with Rule 11 of the Workers' Compensation Court Rules of Procedure. On the second appeal, the Court affirmed the trial court's dismissal of plaintiff's claim.

Plaintiff was a driver for a construction company and his employment required him to work at job sites for extended periods of time. If the job lasted less than 30 days, employees were allowed to take a company truck to return to their homes on weekends. If the job lasted more than 30 days, employees were required to use their personal vehicles to return home. The job at the time of the injury was expected to last four to five months. Plaintiff was injured when he swerved to avoid a deer while returning to the jobsite from a weekend trip home.

In dismissing the claim, the trial court found that plaintiff had a fixed place of employment, therefore the going and coming rule applied. Under this rule, injuries sustained by an employee while going and coming from work, at a fixed place of employment, do not arise out of the course of employment unless it is determined that a causal connection exists between an employer-created condition and the occurrence of the injury. See *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998). The trial court found that there was no causal connection between an employer-created condition and plaintiff's injury, that plaintiff was not a commercial traveler, and that plaintiff was not on a special errand at the time of the injury. The review panel affirmed. The Supreme Court agreed that the plaintiff had a fixed place of employment, noting that the plaintiff was assigned to work in a specific geographic area and that the company had a "hub" facility at the jobsite. Furthermore, the fact that the plaintiff was required to travel to an established jobsite did not constitute an employer-created condition. Nor did the employer create the condition of placing the plaintiff on a public highway. Thus, the plaintiff's injury was not compensable unless he was a commercial traveler or unless he came under the special errand exception to the going coming rule.

The Supreme Court stated that in order to be a commercial traveler, plaintiff must be required to travel in the performance of his duties and be on the employer's business during the travel, with the employer's mission being the major factor in the travel. The Supreme Court agreed with the trial court's finding that the plaintiff had no business duties driving back and forth from his home to the jobsite. Travel was not required by the employer. Employees were free to return home on weekends if they chose to and the plaintiff chose to return to his home. Therefore, the Supreme Court found the plaintiff not to be a commercial traveler.

Finally, plaintiff argued that the "special errand" exception to the going and coming rule should apply. The special errand exception applies when an employee makes an off-premises journey which would normally not be covered under the going and coming rule. That journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself. See *Larson's Workers' Compensation Law* §14.05(1) (2001). Plaintiff was not engaged in a journey that was made due to the employer's instruction, direction, requirement, or suggestion. Therefore, the Supreme Court found that the plaintiff was not within the "special errand" exception to the going and coming rule.

10. Turney v. Werner Enterprises, Inc., 260 Neb. 440, 618 N.W. 2d 437 (2000).

SUBROGATION

CONFLICT OF LAWS

The Supreme Court remanded this cause back to the trial court to determine the appropriate distribution of the settlement proceeds consistent with the Court's opinion.

In 1992, plaintiffs were employed as truck drivers and were involved in a motor vehicle accident in Pennsylvania. Defendant paid the plaintiffs' workers' compensation benefits following the injury. In 1994, plaintiffs brought suit in Pennsylvania against the third-party tortfeasor and eventually reached a settlement. In 1996, defendant was contacted and thereafter participated in the settlement negotiations. Defendant refused to sign the settlement agreement because it was adverse to defendant's subrogation interest under §48-118. Instead, defendant signed a separate release document. In this release, defendant released all claims against the tortfeasor in exchange for its \$242,235.80 subrogation interest. There was a delay in making the payment to defendant, and defendant stopped making workers' compensation payments to plaintiffs.

Plaintiffs petitioned the workers' compensation court to order defendant to resume payment of benefits. The compensation court ordered the case to be stayed until the subrogation interest of defendant was determined. Plaintiffs then brought a declaratory judgment in district court. Defendant argued that in addition to the subrogation interest already received, they were entitled to a credit against future workers' compensation payments. The district court held that the applicable law with respect to the subrogation rights was Pennsylvania law and concluded that defendant was not entitled to any credit against future workers' compensation payments.

The Supreme Court held that the trial court erred in finding that Pennsylvania law governed the subrogation rights because an employer's subrogation interest is determined by the law of the state in which the employee obtained workers' compensation benefits. See *Van Den Heuvel v. Wallace*, 382 Pa. Super. 242, 555 A.2d 162 (1989). The Court stated that defendant's subrogation interest should be determined by §48-118 as it existed prior to the 1994 amendment. In accordance with the pre-1994 language, defendant's dollar-for-dollar interest included both reimbursement for the workers' compensation payments already paid, and a credit against any payments due in the future. Plaintiffs argued that defendant was a third-party beneficiary and bargained away its right to a credit for future payments under §48-118 in exchange for the \$242,235.80 payment. The Court disagreed, stating that defendant's subrogated right to \$242,235.80 existed as a matter of law under §48-118 and was not a benefit conferred by the settlement agreement. Therefore, the Court found that defendant was entitled to a credit against the settlement proceeds for future workers' compensation payments to the plaintiffs until the settlement proceeds are exhausted.

Finally, defendant argued that it was not obligated to pay a portion of the plaintiff's attorney fees. The Court, citing previous findings, decided that if an employer shares in the settlement proceeds under §48-118, rather than seeking to have the settlement set aside, the employer is obligated to pay a reasonable portion of the employee's attorney fees. See *Austin v. Scharp*, 258 Neb. 410, 604 N.W.2d 807 (1999). Because the defendant participated in settlement negotiations, chose not to have the settlement set aside, and shared in the settlement proceeds, the Court found that defendant was liable for a reasonable portion of the plaintiff's attorney fees.

Court of Appeals Cases (Designated for Permanent Publication):

1. Brouillette v. DBV Enterprises, Inc., 9 Neb.App. 757, 619 N.W.2d 482 (2001).

COMPENSATION INSURANCE CONTRACT

NOTICE OF CANCELLATION OF NONRENEWAL

STATUTORY INTERPRETATION

The Court of Appeals affirmed the compensation court's finding that the employer's workers' compensation insurance policy had lapsed due to nonpayment of the premium at the time of injury and therefore, the carrier was not liable to pay for the employee's workers' compensation benefits.

At trial, it was undisputed that the employee had sustained a right shoulder injury from an accident arising out of and in the course of his employment on January 9, 1997. Defendant employer was insured for workers' compensation coverage from December 19, 1995 to December 19, 1996. The carrier sent the employer invoices for renewal policy premiums due on November 25, 1996 and December 25, 1996. The carrier received no payment from the employer and the coverage under the policy was canceled due to nonpayment as of December 19, 1996. On February 9, 1997, the carrier issued an accounting statement to the employer indicating that the policy was canceled. On February 11, 1997, the employer sent a payment which was refunded in part by the carrier. The carrier filed a proof of coverage cancellation notice with the compensation court on February 12, 1997. The employee filed a petition and the carrier asserted that the insurance coverage had been canceled by the date of injury; therefore, they were not liable for any workers' compensation benefits.

The compensation court awarded benefits to the employee, but found that the employer was not insured for coverage. On appeal, the employee and the employer argued that under the applicable statute, Neb. Rev. Stat. §48-144.03, the insurance policy did not lapse, but that coverage extended for a statutory period dating from February 12, 1997 when the carrier filed the cancellation notice with the compensation court. Section 48-144.03 provides that a carrier intending to cancel a policy of insurance shall give notice to the Nebraska Workers' Compensation Court and to the employer, fixing the date on which it is proposed that such cancellation be effective. The Court of Appeals disagreed with the employee and employer, opining that §48-144.03 deals only with situations where an insurer cancels the policy within a contract period or intends not to renew.

The statute did not apply in the instant case as the carrier had no intent to cancel the policy. On its face, §48-144.03 does not obligate the carrier to notify the compensation court when a policy has simply lapsed for the employer's failure to pay the premium due. If the statute had applied, then 1) the carrier would have had to report the 'cancellation'; 2) the cancellation would not have been effective until the court received it; and 3) the employer would have had coverage on the date of the employee's injury.

The Court of Appeals affirmed the compensation court's interpretation of the statute citing *Struve Enter. v. Travelers Ins. Co.*, 243 Neb. 516, 500 N.W.2d 580 (1993) for the proposition that failure to pay a renewal premium when a workers' compensation policy was reissued constitutes a lapse rather than a cancellation of the policy. No recovery can be had upon a lapsed policy because the contractual relationship between the parties has ceased. Further, the burden is on the insured to keep a policy in force by the payment of the premiums. The carrier is not required to prove contractual or statutory notice of noncoverage to the insured or the

compensation court. Id.

2. Cochran v. Bill's Trucking, 10 Neb.App. 48, 624 N.W.2d 338 (2001).

ATTORNEY FEES

TEMPORARY PARTIAL DISABILITY

The Court of Appeals reversed the review panel's decision that plaintiff was not entitled to attorney fees under §48-125, but upheld the panel's remand for a recalculation of plaintiff's temporary partial disability benefits.

Section 48-125 allows attorney fees to be awarded in all cases in which the employer refused or neglected to pay compensation or medical benefits within 30 days after the employee receives an award. The trial judge awarded attorney fees in the amount of \$5,000.00. The review panel reversed, finding that the plaintiff failed to prove the unpaid medical bills had ever been submitted to defendants. The Appeal Court agreed with the trial judge, stating there was evidence that bills were sent to defendant with outstanding amounts listed. In addition, plaintiff introduced evidence through his testimony that the reason he discontinued treatment was because his medical bills had not been paid. The Court also noted that the review panel improperly relied on defendant's attorney's statement that he had not seen the bills until the time of trial. The Court reiterated that assertions of attorneys at trial cannot be treated as evidence. See *City of Lincoln v. MJM, Inc.*, 9 Neb.App. 715, 618 N.W.2d 710 (2000). Based on the above, the Court found that the record supported the trial judge's decision to award attorney fees. The court remanded for evidence and specific findings as to the appropriate amount of attorney fees to be awarded, as the trial judge provided no explanation for the basis of a \$5,000.00 attorney fee.

The Appeal Court also upheld the decision of the review panel to remand the case for a determination of temporary partial disability benefits. The Court of Appeals agreed with the review panel's conclusion that it was erroneous for the trial judge to correlate plaintiff's temporary partial disability benefits to fluctuations in the federally mandated minimum wage.

3. Green v. Drivers Management, Inc., 10 Neb.App. 299, --- N.W.2d --- (2001).

MEDICAL EVIDENCE

TEMPORARY TOTAL DISABILITY

EXPERT OPINIONS

LOSS OF EARNING CAPACITY

PERMANENT PARTIAL DISABILITY

The Court of Appeals affirmed the award of temporary total disability and vocational rehabilitation but reversed and vacated in regard to the award of permanent partial disability benefits, certain medical expenses, and attorneys' fees.

The trial judge awarded plaintiff 50 percent loss of earning capacity although none of the employee's physicians assigned him a permanent impairment rating nor gave him permanent physical restrictions. Instead, the trial judge relied on the employee's testimony, and the review panel affirmed. The Court of Appeals, however, disagreed, citing *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986). Based on *Snyder*, the Court held that there can be no award for loss of earning capacity in the absence of proof of permanent physical impairment to the body as a whole. While the court may rely on a claimant's testimony in determining the degree of disability suffered without expert testimony, *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996), the court may not rely solely on a claimant's testimony for evidence of a permanent impairment when the injury is subjective in nature. In the instant case, the requirement that there first be expert medical testimony showing a causal connection between the incident and injury and evidence of permanent impairment was not met; therefore, the extent of permanent disability was based on mere speculation.

In spite of the fact that the employee failed to prove any permanent impairment and that the Court reversed and vacated the award of permanent partial disability, the Court held that the employee was entitled to vocational rehabilitation benefits. Noting that the applicable statute, Neb. Rev. Stat. §48-162.01 was amended in 1993, the Court found that there is now no requirement that an injured worker have permanent disability to be eligible for vocational rehabilitation benefits.

With regard to the trial judge's award of temporary total disability benefits, defendant argued that the employee was not entitled to such benefits for a period of time when he was not given any work restrictions or limitations and was physically able to perform many jobs. Noting that whether a worker is totally disabled is a question of fact, the Court upheld the trial judge's finding that there was competent evidence to support the award of temporary total disability.

Finally, the Court determined that the order for reimbursement of certain medical expenses paid by the employee and his health insurance carrier was incorrect as a matter of law because these expenses were not offered into evidence. In addition, the trial judge's award of future medical expenses was overly broad as it did not reflect the requirement that such expenses be reasonable, necessary, and causally related to the injury.

4. Haro v. Beef America, 9 Neb.App. 957, 622 N.W.2d 170 (2001).

TEMPORARY TOTAL DISABILITY

LOSS OF EARNING CAPACITY

The Court of Appeals upheld the compensation court review panel's affirmance of the single judge's award of benefits for a work-related injury.

Defendant asserted that the court erred in finding that plaintiff was temporary totally disabled from November 25, 1995 through December 4, 1996, because no medical evidence established such a finding. In upholding the award of temporary total disability benefits, the Court of Appeals explained that there was medical evidence to establish that the cause of plaintiff's injury was work-related, and the compensation court was free to consider plaintiff's own testimony in assessing whether he was totally disabled during the year in question. The Court of Appeals stated that defendant's records indicated plaintiff's last day of employment was November 24, 1995; therefore, the Court affirmed the compensation court's holding regarding commencement of temporary total disability on that date.

Defendant also claimed the compensation court erred in finding that claimant had suffered a 40 percent loss of earning capacity. The compensation court had chosen to give greater weight to Dr. Froggatt's opinion under which the court-appointed vocational rehabilitation counselor would have found that claimant sustained a 37.7 percent loss of earning. Dr. Froggatt had performed the surgery on claimant and had treated him for a longer period of time than Dr. O'Neil. Based on Dr. O'Neil's analysis, the claimant would have had a 5 percent loss of earning capacity. The Supreme Court reiterated that the trial judge does not necessarily need to rely solely on expert testimony to determine the degree of disability. The court may rely on the testimony of the claimant for such a determination (see *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996)), and that is what the trial judge did in this case. The Court of Appeals also upheld the slight increase in loss of earning percentage that the compensation court granted, explaining that there was competent evidence in the record to indicate that plaintiff suffered a loss of earning capacity as high as 49.8 percent.

5. Romero v. IBP, Inc., 9 Neb.App. 927, 623 N.W.2d 332 (2001).

LOSS OF EARNING CAPACITY

REBUTTABLE PRESUMPTION OF CORRECTNESS

EXPERT TESTIMONY

The Court of Appeals reversed a compensation court review panel decision reversing the single judge's determination that plaintiff had sustained a 50 percent loss of earning capacity. The Appeal Court ruled that the single judge's holding that the loss of earning capacity report submitted was not entitled to a presumption of correctness presented a question of fact, not of law. Therefore, it could not be reversed by the review panel unless it was clearly wrong.

The court-appointed vocational rehabilitation counselor found plaintiff sustained a loss of earning capacity between 25 percent to 40 percent, depending on whether Dr. McGowan's restrictions were accepted. The trial judge found Dr. McGowan's opinion contained inherent inconsistencies. That finding, plus plaintiff's own testimony about his physical restrictions and his present job, all combined to rebut the presumption of correctness afforded the court-appointed counselor's loss of earning assessment under §48-162.01(3). Therefore the trial judge concluded plaintiff sustained a 50 percent loss of earning capacity. The review panel reversed, stating the trial judge was bound to accept the presumption of correctness and make a loss of earning capacity determination within the range of 25 percent - 40 percent.

The Appeals Court upheld the single judge's conclusion that plaintiff sustained a 50 percent loss of earning capacity. The Court observed that the trial judge first found the loss of earning capacity report assigning the plaintiff 25 percent-40 percent loss of earning capacity was based on contradictory medical reports of the same doctor. Therefore, the judge properly made the determination that it was more likely than not that the opinions contained in the loss of earning capacity report were incorrect. The trial judge then conducted his own evaluation of plaintiff's loss of earning capacity. The trial judge's evaluation was premised upon the plaintiff's work history, his testimony regarding his physical restrictions, the type and nature of plaintiff's employment with defendant at the time of the hearing, and the totality of the evidence. The Appeal Court held that such an evaluation was clearly within the single judge's authority because the Nebraska Supreme Court has made it clear that loss of earning power is a question of fact. Furthermore, the Appeal Court expressly found that the rebuttable presumption of correctness under §48-162.01(3) can be rebutted not only by the testimony of another expert, but also by the testimony of the claimant.

6. Thomas v. Lincoln Public Schools, 9 Neb.App. 965, 622 N.W.2d 705 (2001).

SUBROGATION

STATUTE OF LIMITATIONS

The Court of Appeals affirmed the compensation court finding that plaintiff's claim was barred by the statute of limitations because defendant had made no payment of compensation to plaintiff within the two years prior to the filing of her petition.

The plaintiff was injured by a third-party tort-feasor on November 25, 1991, and the last payment she received from defendant for workers' compensation benefits was on July 26, 1994. Plaintiff and defendant then jointly sued the third-party tort-feasor for plaintiff's injuries and defendant's subrogation interest. The parties reached a settlement and on January 7, 1998, the settlement proceeds were disbursed in part to the plaintiff and in part to the defendant as full payment of their subrogation interest.

On December 15, 1998, the plaintiff filed a petition seeking additional workers' compensation benefits. Plaintiff argued that the third-party payment was compensation which tolled the two-year statute of limitations. Defendant argued that the third-party payment was not "compensation" under the Workers' Compensation Act, and even if it was compensation, this claim was barred by the two-year statute of limitations. The Court of Appeals agreed that the payment was compensation based on the language in §48-118, which provides that recovery against a third-party tort-feasor "shall be treated as an advance payment by the employer, on account of future installments of compensation". Therefore, the question was whether a third-party recovery removes the bar of the statute of limitations and subjects the employer to a suit for additional workers' compensation benefits if the recovery occurs after two years have passed since the previous payment.

The Court of Appeals held that once two years passed without a payment of compensation from the employer, which could be payment from a third party suit (before the two-year statute runs), direct payment from the employer or its carrier, or a payment caused to be made by the employer, the statute of limitations bars further suit against the employer. The present action was filed on December 15, 1998 and the last payment of benefits occurred on July 26, 1994. Thus, the payment in this case did not remove the bar of a statute of limitations which had already run at the time of the payment from the third party lawsuit. In sum, the court held that once the case is barred by the statute of limitations, it remains barred.

7. Watson v. Omaha Public Power Dist., 9 Neb.App. 909, 622 N.W.2d 163 (2001).

OCCUPATIONAL DISEASE

DATE OF INJURY

The Court of Appeals found that the compensation court had erred in establishing a date of injury, modified the award by determining that the date of injury occurred when plaintiff's asbestosis precluded him from doing the same type of work, and affirmed the award as modified.

Plaintiff was exposed to asbestos while working for defendant as a steamfitter and welder and was terminated for unrelated reasons in 1996. Plaintiff's breathing problems continued after he began work for a new employer, but he never missed any time from work due to his breathing problems. He was first diagnosed with pulmonary asbestosis in October 1997, and resigned from his employment for unrelated reasons on February 11, 1998. A physician opined that plaintiff's asbestosis began interfering with his ability to work on January 8, 1998. Based on this testimony, the compensation court determined that date, January 8, 1998, to be the date of injury for purposes of the award. However, the trial judge also determined that there was no evidence in the record to support a finding that asbestosis caused plaintiff to cease any work or any type of work before or on January 8, 1998. Under *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999), where an occupational disease does not result in any cessation of employment, there is no date of injury. The only issue raised on appeal by defendants was whether the compensation court properly determined the date of injury. The Court's review of the case law revealed that the date of injury is the date on which the effects of the occupational disease manifest themselves in disability. *Ross v. Baldwin Filters*, 5 Neb.App. 194, 557 N.W.2d 368 (1996). Such disability occurs when the diagnosed condition progresses to the point where cessation of employment is necessary. The Court recognized that plaintiff's occupational disease was not the cause of his leaving his second employer, but found sufficient evidence in the record to indicate that it did cause him to cease working in that type of employment. Therefore, the correct date of injury was February 11, 1998, the date plaintiff was precluded from working in the type of employment commensurate with his training and experience as a steamfitter and welder that he had pursued for over seventeen years.

8. Weichel v. Store Kraft Mfg. Co., 10 Neb.App. 276, --- N.W.2d --- (2001).

MANAGED CARE DISPUTE RESOLUTION

REASONABLE MEDICAL EXPENSES

VOCATIONAL REHABILITATION

The Court of Appeals affirmed in all respects the compensation court review panel findings that certain medical treatment was not related to the work injury in question and that plaintiff was not entitled to vocational rehabilitation.

Plaintiff was diagnosed with spinal stenosis. Among four examining doctors, only one, Dr. Ripa, expressed an opinion that the condition was work-related. Dr. Ripa was only able to state that the condition could be related to plaintiff's work injury. Dr. Ripa subsequently performed surgery on plaintiff. The Court of Appeals held that the trial court was not clearly wrong in finding the treatment and surgery that plaintiff underwent were not directly and proximately caused by the work injury, thus his medical bills were not recoverable. There was conflicting medical evidence and the compensation court was the sole judge of credibility of the medical evidence. According to the Court of Appeals, the record contained enough evidence to substantiate the court's finding that the medical bills were not recoverable.

Plaintiff had also argued that defendant was obligated to pay for the spinal surgery because the doctor appointed in accordance with the internal dispute resolution policy within the employer's managed care plan found the surgery to be work-related. The Court of Appeals held that there was no portion of the dispute resolution policy that made the appointed doctor's determinations binding upon the parties, nor which required defendant to proceed with the proposed resolution.

Regarding vocational rehabilitation, the trial judge had originally found plaintiff was entitled to such benefits because at the time of trial, plaintiff was not able to engage in gainful employment. The Court of Appeals agreed with the review panel's reversal of the trial judge on this issue. Plaintiff continued to work for nearly one year after the injury without missing time or seeking medical treatment. Then he worked on light duty jobs for approximately one more year until he went on strike. There was no evidence that plaintiff could not have continued working had he not gone on strike. The Appeal Court held that plaintiff's inability to work at the time of the trial was not the result of a work related injury, but due to the surgery for his non-work-related spinal stenosis.